GUANNEX LEASING SDN. BHD.

v.

CHEONG SAW KEAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C7628 OF 1985]
12 AUGUST 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - Contention that judgment obtained irregularly as writ not served on the defendants - Whether judgment should be set aside.*

The plaintiff claimed against the defendants for RM56,060.68. On 27 January 1986 the plaintiff entered judgment in default of appearance against both the defendants. It is stated in the affidavits of service of the writ, that the writ was served on the defendants at No. 5MF Jalan SS21/39, Damansara Utama, whereas according to the affidavit of the defendants, the address of the 1st defendant is 5MF Jalan SS21/37 and that of the 2nd defendant is No. 11 Jalan 21/1, SEA Park, Petaling Jaya. The defendants contended that the writ was not served on them.

Held:

[1] In the circumstances of this case, there was no service effected on the defendants.

[2] The law is clear that where the service is bad the judgment in default of appearance must be set aside.

[3] In the present case the service of the writ and the statement of claim was bad and irregular. The judgment obtained in default of appearance was therefore an irregular judgment and must be set aside.

[Default judgment set aside with costs.]

Cases referred to:

Armitage v. Parsons [1908] 2 KB 410
Klaxxie Corporation (M) Sdn. Bhd. v. Ng Ai Geok & Anor. [1986] CLJ (Rep) 410
Tan Ah Lek v. Gurcharan Muntara Singh [1978] 1 MLJ 96
P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd. [1958] 24 MLJ
Syarikat Joo Seng & Anor. v. Habib Bank Ltd. [1986] 2 MLJ 129

Other sources referred to:

Supreme Court Practice, 1985 Vol. 1, p. 128

For the defendants/appellants - Low Hop Bing; M/s. Low Hop Bing & Associates
For the plaintiff/respondent - Zainab binti Ahmad; M/s. Vernon Ong Zainab & Partners

JUDGMENT

Zakaria Yatim J:

This is an application by the defendants for an order of the Court that the defendants be given leave to set aside the certificate of non-appearance entered against them on 27 January 1986. The defendants also asked the Court to set aside judgment in default of appearance entered against them on 27 January 1986.

The plaintiff's claim against the defendants is for a sum of RM56,060.68 being damages suffered by the plaintiff as a result of the repudiation of guarantee agreement by the first defendant. On 27 January 1986, the plaintiff entered judgment in default of appearance against both the defendants.

Mr. Low Hop Bing, Counsel for the defendants submitted that the judgment obtained against the defendant was an irregular judgment. According to him the writ was not served on the defendants. He referred to the affidavits of service whereby it was stated that in respect of the second defendant, the writ and the statement of claim was served on 13 January 1986 at 10.30 a.m. at No. 5MF, Jalan SS21/39, Damansara Utama, Petaling Jaya. In respect of the first defendant, the affidavit of service stated that on 13 January 1986 at 10.30 a.m. the writ of summons and the statement of claim were served on the first defendant at No. 5MF, Jalan SS21/39, Damansara Utama. According to the affidavit of the defendants in support of the present application, the address of the first defendant is No. 5MF, Jalan SS21/37 and the address of the second defendant is No. 11, Jalan 21/1, SEA Park, Petaling Jaya, I note that the address of the second defendant as given in the affidavit is consistent with his address stated on the writ. The address of the first defendant, however, as stated on the writ is the old address.

Miss Zainab, Counsel for the plaintiff submitted that the service was a good service and told the Court that the judgment in default of appearance was obtained regularly. She said that the fact that the address as stated in the affidavit of service is Jalan SS21/39 is a typographical slip and in his affidavit in reply the clerk in the employ of Messrs. Vernon Ong Zainab & Partners appeared to have corrected the error. In paragraph 3 of that affidavit he stated that the address described in the second line of his earlier affidavit should read No. 5MF, Jalan SS21/37 and not 5MF, Jalan SS21/39. According to him the error was a typographical error. Miss Zainab submitted that this error was curable by the affidavit just referred to and in support of her argument she cited a passage in the *Supreme Court Practice*, 1985 Vol. 1 at p. 128 where it is stated: "If the irregularity is due to an error arising from an accidental slip or omission, it may be corrected."

I note that the passage just cited is based on the decision of the Court of Appeal in England in *Armitage v. Parsons* [1908] 2 KB 410. In that case the error was an accidental slip because the amount included in the judgment for costs exceeded by a few shillings the amount properly allowable for costs. The Court held that the plaintiff could amend the error and the majority of the Court of Appeal held that the defendant was not entitled to have the judgment set aside by virtue of the slip.

In my view, *Armitage's* case is different from the present case. In the instant case, the error is not an accidental slip. The address of both defendants as stated in the writ is No. 11, Jalan 21/1, SEA Park, Petaling Jaya. The affidavit of service, however, stated that the writ was served on both defendants at Jalan SS21/39. The certificate of non-appearance also states that the address of both the defendants is No. 5MF, Jalan SS21/39, Damansara Utama, Petaling Jaya. It was on the basis of this certificate of non-appearance that the plaintiff obtained judgment in default of appearance. The plaintiff in fact knew the current address of the first defendant. In the lease agreement dated 16 December 1983, the correct address was given i.e. Jalan SS21/37. Yet they served the writ on the first defendant at the wrong address and they also served the writ on the second defendant at Jalan SS21/39, instead of No. 11, Jalan 21/1, SEA Park. There is further evidence that the plaintiff should have known that No. 5MF, Jalan SS21/39 is not the correct address of both the defendants. On 18 March1986, they sent two AR registered letters to both the defendants at the address No. 5, Jalan SS21/39 and Miss Zainab conceded that these letters were returned to her firm.

In my view the error made by the plaintiff in serving the writ at the wrong address is not a mere irregularity which can be cured. In any case, even if it is a mere irregularity which could be cured, the plaintiff made no attempt to rectify the error but instead proceeded on to file a writ of seizure and sales. In this respect, I shall adopt a passage in the dissenting judgment of Fletcher Moulton LJ in the *Armitage* case where he said:

> In the first place I do not think that this power ought to be exercised in order to assist a wrongdoer who is acting upon the judgment as unamended. In the present case the application was not by the plaintiff to be allowed to amend his judgment. He has issued execution upon the judgment, and it is only when the defendant claims his right to have the judgment set aside that the plaintiff asks that the judgment, which he is still enforcing, may be amended for his benefits. I do not think that under those circumstances we ought to exercise the power of amendment given by the rule. There is another reason, in my opinion, why we should not do so. I am not satisfied that this case is one of an "error arising from an accidental slip" such as ought to form ground for relief under the rule ...

In my judgment, in the circumstances of this case there was no service effected on the defendants. Miss Zainab cited my judgment in *Klaxxie Corporation (M) Sdn. Bh. v. Ng Ai Geok & Anor.* [1986] CLJ (Rep) 410. In that case, I held that having heard the evidence of all the witnesses, I was of the opinion that there was a strong possibility that the writ was served on both the defendants but I must state here that in that case in view of the conflicting affidavits Counsel for both parties agreed that the deponents of the affidavits be cross-examined in order to derermine whether the writ was porperly served or not. It was after hearing the evidence of the witnesses that I came to the conclusion that there was a strong possibility that the writ was served. The Court need not be satisfied beyond any doubt that the writ was served or not. In *Tan Ah Lek v. Gurcharan Muntara Singh* [1978] 1 MLJ 96, the service of the summons on the defendant was effected by a registered letter. That letter was not delivered or received and it was returned unclaimed. Chang Min Tat J, as he then was, in his judgment in that case said,

> There is good reason for the rule since by a prepaid registered letter there would be returned to the sender a card indicating either that the letter had been delivered or that the addressee had refused service, if in fact he had refused service.

It would appear that in *Tan Ah Lek's* case that there was a possibility that the registered letter was delivered to the defendant but he refused to accept service. Nevertheless the learned Judge held that the service was a good service. The learned Judge in his judgment said that where the service has not been effected or where it cannnot be reasonably presumed from the circumstances of the case, that service would have been effected but for the wilful refusal on the part of the defendant to accept service. The learned Judge added that the defendant was entitled to *ex debito justitiae* to have the judgment set aside.

The law is clear that where the service is bad the judgment in default of appearance must be set aside. See *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] 24 MLJ 113. See also *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129.

In the present case since the service of the writ and the statement of claim was bad and irregular, the judgment obtained in default of appearance, was therefore, an irregular judgment. I accordingly order that the judgment obtained in default of appearance be set aside with costs.

Also found at [1987] 2 CLJ 42